

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ALASKA**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>3:10-cr-00124 JWS</b>
	)	
<b>vs.</b>	)	<b>ORDER FROM CHAMBERS</b>
	)	
<b>SIMON D. SMITH,</b>	)	<b>[Re: Motion at docket 43]</b>
	)	
<b>Defendant.</b>	)	
_____	)	

**I. MOTION PRESENTED**

At docket 43, defendant Simon D. Smith moved to dismiss Counts 5, 6, 13, and 14 of the Indictment as multiplicitous. The matter was fully briefed, and oral argument was heard by the magistrate judge to whom the matter had been referred for a recommendation. In her report at docket 64, Magistrate Judge Smith recommended that the motion be denied. Defendant filed timely objections at docket 69, to which the United States did not reply.

**II. STANDARD OF REVIEW**

The district court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.”<sup>1</sup> When reviewing a magistrate judge’s report and recommendation in a case such as this one, the district court conducts *de*

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<sup>1</sup>28 U.S.C. § 636(b)(1).

*novo* review of all conclusions of law,<sup>2</sup> and any findings of fact to which objections have been made.<sup>3</sup> Uncontested findings of fact are reviewed for clear error.<sup>4</sup>

### **III. DISCUSSION**

Having reviewed the file and applied the standard of review articulated above, this court agrees with the magistrate judge's recommended findings and conclusions. With respect to the defendant's objections, the court finds nothing not adequately addressed by Judge Smith's recommendation and the case law upon which she correctly relied. The court writes further, however, to note that, like Magistrate Judge Smith, it is troubled by the result here. Nonetheless, this court is bound by Ninth Circuit precedent to deny the motion. This result is compelled by the holding in *United States v. Andrews*.<sup>5</sup> Accordingly, this court adopts the findings and conclusions recommended by the magistrate judge. Based thereon, the motion at docket 43 is **DENIED**.

DATED at Anchorage, Alaska, this 1st day of September 2011.

/s/ JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>*Barilla v. Ervin*, 886 F.2d 1514, 1518 (9th Cir. 1989), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

<sup>3</sup>28 U.S.C. § 636(b)(1).

<sup>4</sup>*Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888, 906 (3d Cir. 1992).

<sup>5</sup>75 F.3d 552 (9th Cir. 1996).